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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. DOUGLAS DWAYNE GIRLEY, Defendant and Appellant.	C062511 (Super. Ct. No. SF110002A)

Defendant Douglas Dwayne Girley appeals following a conviction for attempted premeditated murder of his wife (Pen. Code, §§ 187, 664[1]), infliction of corporal injury on a spouse (§ 273.5, subd. (a)), and assault by force likely to produce great bodily injury (§ 245, subd. (a)(1)). Defendant contends the trial court erred in (1) failing to order a second competency hearing (§ 1368) after defendant jumped out of the jail's second story window and (2) removing defendant from the

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[1] Undesignated statutory references are to the Penal Code.

courtroom during closing arguments for disrupting the proceedings. Defendant also seeks correction of sentencing errors conceded by the People. We modify the judgment to correct the sentencing errors and affirm the judgment as modified.

BACKGROUND

The People charged defendant with (1) corporal injury to a spouse (§ 273.5, subd. (a) -- count 1), (2) assault by means of force likely to produce great bodily injury or with a deadly weapon (§ 245, subd. (a)(1) -- count 2), and (3) attempted premeditated murder of his wife (§§ 187, 664 -- count 3). The pleading also alleged personal infliction of great bodily injury (§ 12022.7, subd. (e)), personal use of a deadly weapon (tire iron) (§ 12022, subd. (b)(1)), and prior conviction and prior serious felony for a 1999 assault with a deadly weapon (§§ 245, subd. (a)(1), 667, subds. (a), (d), 969, 969f, 1170.12, subd. (b).)

On December 30, 2008, the trial court suspended the proceedings for an evaluation of defendant's competence to stand trial. (§§ 1367, 1368.) On February 5, 2009, the trial court found defendant competent to stand trial.

Evidence at trial included the following:

After approximately 16 years of marriage, defendant's wife, Gwendolyn Taylor-Girley (the victim), wanted a divorce. Defendant did not. They argued. On October 20, 2008, defendant hit the victim with a tire iron in their garage and choked her with his hands. The victim suffered a skull fracture, a head

laceration requiring approximately 30 staples, two fractured index fingers, bruises, and a recurring problem with double vision.

The next day, defendant left a message on the victim's voicemail, stating: "In case you lived through that trauma, I was trying to make sure you was [*sic*] dead and I was going to be dead right along with you, but you lived through it, and you'll see me at my funeral because I'll be the one dead. Forced me over the edge, now I got to go ahead and finish what I started. And likely, you was involved in this death right now. I couldn't take it no more, with you bitch slapping me over and over again, you couldn't leave well enough alone. Now I got to go ahead and finish off my life, thinking we was going to be buried together, death do us part."

Defendant testified at trial and claimed the victim is bipolar and prone to hallucinations. Defendant's version of events was that the victim was startled by his presence in the garage, lost her balance, and hit her head. He panicked and ran. He left the voicemail message because he was "out of [his] mind." He swallowed a bottle of sleeping pills, awoke in a hospital, and fled for fear of being sent to a mental hospital. Defendant acknowledged he pleaded guilty in 1999 to holding a gun on his wife, though he claimed it never happened and he was talked into the plea.

The jury found defendant guilty on all counts and found true the enhancement allegations.

On July 20, 2009, the trial court sentenced defendant to an indeterminate term of 14 years to life for attempted murder and a determinate term of 10 years for the enhancements (to be served before the indeterminate term). The trial court also sentenced defendant to 18 years on count 1 (spousal injury) and 17 years on count 2 (aggravated assault) but stayed those sentences under section 654.

DISCUSSION

I

Defendant contends the trial court erred by failing sua sponte to conduct a *second* competency hearing (§ 1368) after defendant jumped from a second story window at the jail. We disagree.

A

The trial court received and considered two psychiatrists' evaluations on February 5, 2009, and found defendant competent to stand trial. One doctor added his opinion that there was a "significant likelihood" defendant might "act out" to disrupt the proceedings, which defendant believed had very little chance of turning out in his favor.

On March 4, 2009, during a court recess of the preliminary hearing, defendant either fell, slipped, or laid down on the floor of the holding cell. He was medically examined, as required by the rules, and returned to court the next day, claiming he did not feel well enough to help counsel. After discussion, the preliminary hearing resumed.

On the date set for trial, June 11, 2009, defendant "passed out" in his holding cell. A medical examination revealed no medical problem.

During the prosecutor's closing argument on June 17, 2009, defendant began sweating and appeared as if he were going to pass out. The trial court ordered a recess. A hospital examination revealed nothing medically wrong. After defendant was released from the hospital, he jumped out a second-story window at the jail, requiring medical treatment of several staples to the head and a neck brace.

Defendant next appeared in court on June 23, 2009. Defendant said he took medication but did not know its name. When asked if he was ready to finish the trial, defendant asked, "What trial?" When asked why he jumped, defendant said he did not jump; he fell out of bed. When asked why he got sick in court the previous week, defendant gave no response and, when pressed, just repeated the question, "What happened?"

Defense counsel expressed concern about defendant's competency. The trial court concluded there was insufficient evidence of a change in circumstances as to defendant's competence to stand trial.

The prosecutor continued his closing argument, during which defendant passed out. Another medical examination revealed no medical cause. The trial court questioned the doctor who examined defendant for the two most recent incidents. The doctor stated he could find no medical reason for defendant to pass out. The trial court asked if there was any way to discern

feigned fainting. The doctor said fluttering eyelids would be consistent with faking. The trial court stated it observed defendant's eyelids moving when he appeared to pass out that day. The trial court concluded defendant was trying to delay the trial. The court said:

"Before we started this trial, I admonished [defendant] that his -- if he disrupts the court proceedings in any fashion, I would either have to take additional physical measures, such as chaining him, or I would have him removed from the courtroom. [¶] At this point, [defendant] is -- has become so disruptive of these proceedings that he has caused me not to go forward in this trial on three separate occasions, and I find that those disruptions were purposeful, he had a plan, and he put the plan into action and he has been successful in delaying this trial. [¶] Therefore, I find that I have no other reasonable means to go forward in this trial. If I chain him to the chair, it doesn't solve the problem. [¶] The least restrictive means I can do is to remove him from the courtroom. [¶] At this point, he is -- he has become so disruptive that he has delayed this trial and he has lost his right to be here in this courtroom. Therefore, we are going to proceed in his absence . . . ."

B

Trial of a mentally incompetent criminal defendant violates the due process right to a fair trial under the federal Constitution and state law. (*People v. Rogers* (2006) 39 Cal.4th 826, 846.) A mentally incompetent person is a person who, as a result of mental disorder or developmental disability, is unable

to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (§ 1367, subd. (a).)

Having already conducted an inquiry into defendant's competency and found him competent in February 2009, the trial court in this case was not required to conduct a second inquiry in June 2009, in the absence of substantial evidence of a change in circumstances giving rise to a serious doubt about the continuing validity of the earlier competency finding. (*People v. Huggins* (2006) 38 Cal.4th 175, 220; *People v. Kaplan* (2007) 149 Cal.App.4th 372, 383-384.) On appeal, we give deference to the trial court's decision, because the trial court is in a better position to appraise whether the defendant's conduct indicates mental incompetency or a calculated attempt to feign incompetency and delay the proceedings. (*People v. Marshall* (1997) 15 Cal.4th 1, 33.)

The record supports the trial court's conclusion that defendant was feigning incompetency to delay the proceedings, as predicted by one of the doctors. Defendant's repeated episodes of falling or fainting delayed court proceedings pending medical examinations which revealed no medical problem. The repetition alerted the trial court to observe defendant closely, such that the court saw defendant's eyelids flutter during the last episode which, according to the doctor's testimony, was consistent with malingering. This evidence supports the trial court's conclusion that defendant's second-story jump was simply another deliberate attempt to delay the proceedings.

Defendant argues he could not fake sweat. The trial court observed defendant had been "dripping wet" on one occasion. However, sweating does not create a doubt about the validity of the earlier competency finding.

Defendant argues his confusion in answering the court's questions, "if . . . genuine," created a doubt about his ability to assist his defense. However, the record supports the trial court's conclusion that defendant's confusion was not genuine.

Defendant challenges the People's argument that defendant's silence when he received visitors in jail showed he had the mental acuity not to help the prosecution, which he knew was tape-recording the visits. We do not rely on this argument by the People.

We conclude the trial court's denial of a second competency evaluation is not ground for reversal.

II

Defendant next contends reversal is required because the trial court removed him from the courtroom during the prosecutor's closing argument without adequate warning. We disagree.

A defendant has a constitutional and statutory right to be present at critical stages of the criminal trial if his presence would contribute to the fairness of the procedure. (§ 1043; *People v. Perry* (2006) 38 Cal.4th 302, 311.) However, the right is not absolute, and a trial court may remove a disruptive defendant. (*People v. Welch* (1999) 20 Cal.4th 701, 773.) Section 1043, subdivision (b)(1), allows the trial court to

remove a defendant in any case in which "the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom." We apply de novo review to a trial court's exclusion of a defendant from the trial, insofar as the trial court's decision entails a measure of the facts against the law. (*People v. Perry, supra*, 38 Cal.4th at pp. 311-312.)

Here, defendant does not dispute he was disruptive; he argues only that the trial court was required to give him a final warning before removal.

As indicated, when the trial court ordered defendant removed, the court said: "Before we started this trial, I admonished [defendant] that . . . if he disrupts the court proceedings in any fashion, I would either have to take additional physical measures, such as chaining him, or I would have him removed from courtroom."

The record bears out the trial court. At the outset, on June 8, 2009, the trial court told defendant, "just some rules of court. You have to behave appropriately under all circumstances. That means you are not allowed to speak out of turn or to disrupt the court proceedings in any way. If you do any of those items or anything that's disruptive, you will be removed from the courtroom. [¶] Do you understand that, sir?" Defendant gave no verbal response until prodded. He then said, "I heard you." On June 10, 2009, the trial court observed

outside the jury's presence, "[defendant] did speak out in court and was disruptive. [¶] You can't do that, [defendant], that will not only cause you to be removed, but it will cause me to chain you to the chair."

Defendant argues he was warned only about disruptive outbursts, not disruptive delays, and he claims he was entitled to a final opportunity to correct the specific behavior that resulted in the removal. Even assuming for the sake of argument that the trial court should have given an additional warning, reversal is not warranted.

Defendant contends this type of error is structural error requiring reversal per se. He acknowledges, however, that we are bound by the contrary holding of the California Supreme Court in *People v. Perry, supra,* 38 Cal.4th at page 312, that error in removing a defendant from trial is not structural. To obtain reversal, the defendant must show prejudice, in that his presence could have substantially benefited the defense. (*Ibid.*; *People v. Coddington* (2000) 23 Cal.4th 529, 630, superseded by statute on other grounds as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1107, fn. 4; overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) *Coddington* held that absence during closing argument was harmless because nothing in the record suggested the absence prejudiced the defendant. (*Id.* at p. 630.)

Here, defendant makes no showing of prejudice, choosing to rely instead on his meritless claim of structural error.

We observe the record shows no prejudice. Defendant was not removed until closing argument of the prosecution, at which point defendant's presence would not have substantially benefited the defense. Defense counsel waived defendant's presence for the court's handling of a jury request to see the tire iron during deliberations. The trial court had defendant brought to the courthouse for possible attendance at the reading of the jury's verdict, but said defendant "is being uncooperative with the court staff and not obeying their directions. So I am not going to bring him up." Defendant was present for sentencing.

We conclude removal of defendant from portions of the trial does not warrant reversal.

III

The trial court added a five-year enhancement for the prior serious felony (§ 667, subd. (a)) to each of the three counts -- the indeterminate sentence for attempted murder, and the two determinate sentences for the other two counts. Defendant argues it was improper to impose the enhancement on each of the counts which received determinate sentences. The People concede the error.

A section 667, subdivision (a), enhancement may be used to enhance a determinate sentence only once, regardless of the number of determinate terms that make up the total sentence. (*People v. Misa* (2006) 140 Cal.App.4th 837, 845.)

The reporter's transcript and the court's minute order show the trial court added a section 667, subdivision (a),

enhancement on the determinate sentences for both counts 1 (spousal injury) and 2 (aggravated assault). Defendant notes the error is not reflected on the abstract of judgment and asks us simply to order a corrected minute order. The People also observe the abstract of judgment erroneously fails to reflect any section 667, subdivision (a), enhancement for count 1 or 2. The People ask that we amend the abstract of judgment to show a section 667, subdivision (a), enhancement on either count 1 or count 2.

The trial court's verbal pronouncement of sentence controls over the abstract of judgment. (*People v. Freitas* (2009) 179 Cal.App.4th 747, 750, fn. 2.) Thus, the trial court erroneously applied two section 667, subdivision (a), enhancements on counts 1 and 2. Only one is allowed, yet the abstract of judgment fails to show even the one. Accordingly, we modify the abstract of judgment to show a section 667, subdivision (a), enhancement on count 1.

IV

Defendant contends he was entitled to 32 days of presentence conduct credits under section 2933.1. The People agree.

The trial court gave 218 days credit for time served. In an apparent typographical error, the reporter's transcript shows the trial court stating conduct credits were barred by section 2933.25. A section of this number, proposed by Initiative Measure (Prop. 6, § 6.18), was rejected at the November 4, 2008, General Election. (See Historical and Statutory Notes, 51B

West's Ann. Pen. Code (2011 supp.) foll. § 2933.25, p. 104.) We find no section barring all conduct credits. Section 2933.2 precludes persons convicted of *murder* from receiving presentence conduct credits (§ 2933.2, subd. (c)), but it does not address *attempted* murder. Section 2933.5 prohibits conduct credits for persons with specified prior convictions and prison terms (§ 667.5). Here, defendant's prior assault conviction is not one of the listed offenses, and there is no indication of prior prison terms under section 667.5. Thus, there is no statutory prohibition to conduct credits in this case, though the amount of credits are limited by section 2933.1.

Under section 2933.1, subdivision (c), presentence conduct credits shall not exceed 15 percent of the actual period of confinement if the person is convicted of attempted murder. Defendant was in presentence custody for 218 days. Accordingly, we will order modification of the abstract of judgment to add 32 days of presentence conduct credits under section 2933.1, subdivision (c).

DISPOSITION

The judgment is modified (1) to add a five-year section 667, subdivision (a), enhancement on count 1, and (2) to add 32 days of presentence conduct credits under section 2933.1. The trial court is directed to prepare an amended abstract of

judgment and forward a copy to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NICHOLSON, J.

We concur:

RAYE, P. J.

BUTZ, J.